United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

EDDIE M. HARRISON, ORSON G. WHITE, Appellants,	)	
v.	)	Nos. 20,280 20,281
UNITED STATES OF AMERICA, Appellee.	)	

APPEAL FROM JUDGMENT OF THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

ALFRED V. J. PRATHER
1707 L Street, N. W.
Washington, D. C. 20036

GEORGE J. THOMAS
412 Fifth Street, N. W.
Washington, D. C. 20001

Attorneys for Appellants
By Appointment of this Court

August 23, 1966

STATEMENT OF QUESTIONS PRESENTED

(1) Whether the Trial Court erred when it allowed the prosecutor to read to the jury testimony of the appellants from a previous trial (given to refute confessions erroneously admitted in evidence at that previous trial) over objections that this testimony was fruit of a poisonous tree and its use compelled the appellants to be witnesses against themselves in violation of the Fifth Amendment.

(2) Whether the appellants were denied the speedy trial guaranteed by the Sixth Amendment when there was a three-year delay between completion of their second trial and commencement of their third trial (added to a two-year delay between completion of their first trial and commencement of their second trial).

(3) Whether, in a trial upon an indictment for a killing in the course of attempted robbery, the Court should have directed acquittal when the government failed to prove that the appellants attempted to rob the deceased and substituted improper argument for such proof.

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

EDDIE M. HARRISON, ORSON G. WHITE, Appellants,	)	
v.	)	No.
UNITED STATES OF AMERICA, Appellee.	)	

BRIEF FOR APPELLANTS ON

APPEAL FROM JUDGMENT OF THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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JURISDICTIONAL STATEMENT

The appellants were tried before a jury in the United States District Court for the District of Columbia under an indictment charging felony murder. (Act of March 3, 1901, c. 854, § 798, 31 Stat. 1321, as amended, D.C. Code § 22-2401 (1961)). They were convicted and sentenced to life imprisonment. Applications for leave to appeal in forma pauperis were granted and notices of appeal were timely filed. The District Court had jurisdiction under the Act of June 25, 1948, c. 645, 62 Stat. 826, U.S.C., Title 18 § 3231, and this Court has jurisdiction under the Act of June 25, 1948, c. 646, 62 Stat. 929, U.S.C., Title 28 § 1291.

STATEMENT OF THE CASE

On April 19, 1960, the appellants Eddie M. Harrison and Orson G. White were indicted for felony murder, along with a third defendant, Joseph R. Sampson, for the shotgun slaying of one George "Cider" Brown. All three were convicted and received the death sentence, which was mandatory at that time. (R. 27, 70, 103, 105).

While the three were awaiting execution, it was discovered that they had been represented by Daniel Oliver Wendel Holmes Morgan, a layman falsely posing as the attorney L. A. Harris. Accordingly, this Court ordered the District Court to permit the filing of motions for a new trial. (R. 46-47). The three prisoners refused to seek a new trial, believing that a second trial would constitute double jeopardy. (R. 8, 63-66). There the matter stood for months, with the prisoners on death row, illegally convicted but unwilling to waive their right to be tried but once, while this Court pondered what to do.

Eventually, on June 12, 1962, a second trial was ordered over the prisoners' objection and held on April 22, 1963. (R. 56-57, 2 Tr. 1).[1/] Again the three were convicted. And again the

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1/ The transcripts of the previous trial are identified in this brief as "2 Tr." References to the transcript of the third trial, which is the one involved in this appeal, are identified as "Tr."

conviction was reversed by this Court, this time because of use of inadmissible confessions at the trial. Harrison v. United States, ___ U.S. App. D.C. ___, 359 F.2d 214 (1965). This appeal consumed more than two years, during much of which the case was before the Court, having been argued, awaiting decision.

A third trial was held on May 2, 1966. (Tr. 1). This time the trial judge directed acquittal for one of the three, Sampson (Tr. 136), but Harrison and White were convicted and again sentenced to life imprisonment (Tr. 208).

The trial was an unusual one. There were only three witnesses for the prosecution--a relative who identified the deceased (Tr. 7 et seq.), a police officer who described the scene of the death (Tr. 16 et seq.), and a soldier who testified that Harrison had admitted shooting "Cider" Brown, but had not told him the circumstances (Tr. 54).

The rest of the trial consisted of the U.S. Attorney's reading to the jury excerpts from the transcript of the previous trial. He read the coroner's description of the death wound (Tr. 9 et seq.) and the testimony of three other witnesses that (1) Harrison, Sampson and White had borrowed a black Buick one evening (Tr. 41-42), (2) the next morning Sampson was seen at the same restaurant as the deceased shortly before

his death (Tr. 48), and with two other persons in a black Buick outside the restaurant (Tr. 49-50), and (3) two unidentified men were seen running down the street away from the deceased's house--one with a shotgun--immediately after a loud blast (Tr. 34-36).

At this point in the trial there was no proof of felony murder. The only way such a case could be made was through the confessions of the defendants that this Court had held inadmissible. These confessions said that the defendants had gone to the deceased's house to rob him, that the deceased had slammed the door in Harrison's face, striking the shotgun and causing it to discharge accidentally. At the prior trial the defendants had claimed that these confessions were false and had been obtained by force and threats. The truth, they said, was that Harrison had gone to the deceased to pawn the shotgun, which he did not know was loaded. No robbery was intended or attempted.

This testimony from the former trial, if true, proved that there was no felony murder. However, the U. S. Attorney believed this testimony to be perjury, committed to try to explain away the inadmissible confessions used at the former trial. And this testimony was all the government had

to describe the killing. So he read it to the jury (Tr. 59 et seq., and 99 et seq.) (over objections by the defendants that this testimony was "fruit of the poisonous tree" and its use compelled the defendants to be witnesses against themselves (Tr. 57, 99, 120-123, 130-131)) and argued that it established felony murder (Tr. 137 et seq.). The jury agreed.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Amendment V, Constitution of the United States

"No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . ."

Amendment VI, Constitution of the United States

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."

D.C. Code § 22-2401 (1961)

"Whoever, being of sound memory and discretion, kills another purposely . . . in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any . . . robbery . . . is guilty of murder in the first degree."

STATEMENT OF POINTS

(1) The convictions should be reversed because they were obtained by use of testimony elicited from the appellants at a former trial by introduction in evidence of inadmissible confessions, a course incompatible with the Fifth Amendment to the Constitution of the United States and the doctrine that the government may not use the fruits of its own wrongdoing to secure convictions.

(2) The convictions should be reversed with instructions to dismiss the indictment against the appellants because the three-year delay between their second and third trials (added to the two-year delay between their first and second trials) deprived them of the speedy trial required by the Sixth Amendment to the Constitution of the United States.

(3) The convictions should be reversed because improper argument was substituted for evidence with regard to attempted robbery, an essential element of the felony murder with which the appellants were charged.

SUMMARY OF ARGUMENT

The appellants' conviction of felony murder for an accidental killing in the course of an alleged robbery attempt should be reversed for three reasons, any of which is alone sufficient to sustain this appeal.

(1) The appellants were convicted on the basis of their own testimony from a former trial that was inadmissible because it was wrongfully obtained from them. That testimony was not voluntarily given at the former trial, but was compelled by the prosecution's having submitted in evidence signed confessions that the appellants contended were false and that this Court subsequently held to be inadmissible. Testimony thus obtained by compulsion is barred from use by the Fifth Amendment and by the principle that the government may not use the fruit of its own wrongdoing to obtain convictions.

(2) The six-year delay in bringing the appellants to trial violated their Sixth Amendment right to a speedy trial. While a similar claim by the appellants was rejected by this Court three years ago, the delay since then requires reversal of the present conviction with instructions to dismiss the indictment. The fact that the delay in this case stemmed

principally from the slowness of this Court's processes and from good motives does not diminish the appellants' right to a speedy trial or change the fact that they were deprived of it.

(3) The appellants were tried under a one-count indictment charging felony murder in the course of an attempted robbery. The evidence merely showed a killing, not attempted robbery. This essential element of the crime charged was established only by improper argument by the prosecutor and erroneous instruction by the court.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT COMPELLED THE APPELLANTS TO BE WITNESSES AGAINST THEMSELVES BY ADMITTING IN EVIDENCE STATEMENTS OBTAINED FROM THEM AT A FORMER TRIAL AS A RESULT OF ILLEGAL GOVERNMENTAL ACTION.

The principal witnesses for the prosecution in this case were the appellants Harrison and White, whose testimony (1) was obtained at a former trial as a direct result of illegal government action and (2) was admitted in evidence at this trial over objection that the appellants desired to exercise their Constitutional privilege of not being compelled to be witnesses against themselves. Convictions so obtained must be reversed. They cannot be squared with the Fifth Amendment or with the principle that the government is forbidden to use the fruit of its own wrongdoing to secure convictions.

There is no need for this brief to elaborate the Fifth Amendment's provision that "no person . . . shall be compelled in any criminal case to be a witness against himself." That was done just last term by the Supreme Court in Miranda v. Arizona, ___ U.S. ___, 16 L.ed.2d 694 (1966). There the Court took occasion to remind us of the lofty principles and ancient heritage of the privilege against

self-incrimination, tracing its history, emphasizing its soundness, and extending it to extra-judicial interrogations in state proceedings. In doing so the Court emphasized the liberal construction to be afforded the privilege, recalling an earlier admonition that it was "as broad as the mischief against which it seeks to guard." Counselman v. Hitchcock, 142 U.S. 547, 563 (1892). That mischief--compulsion--was explained by the Court in the words of two other early cases dealing with admission of confessions. The first of these was Bram v. United States, 168 U.S. 532, 549 (1897), where the Court said:

> "The rule is not that in order to render a statement admissible the proof must be adequate to establish that the particular communications contained in a statement were voluntarily made, but it must be sufficient to establish that the making of the statement was voluntary; that is to say, that from causes, which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged, the accused was not involuntarily impelled to make a statement, when but for the improper influences he would have remained silent. . . ."

The second quotation by the Court was from Mr. Justice Brandeis' opinion in Wan v. United States, 266 U.S. 1, 14-15 (1924), where he said:

> "In the federal courts, the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was, in fact, voluntarily made. A confession may have been given voluntarily, although it was made to police officers, while in custody, and in answer to an examination conducted by them. But a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise. Bram v. United States, 168 U.S. 532."

The aim of the Miranda decision was "to assure that the exercise of the right [of silence] will be scrupulously honored . . . ." 16 L.ed.2d at 726. To provide this assurance the Court emphasized that the privilege applied to exculpatory statements as well as outright confessions (16 L.ed.2d at 725) and that waiver of the right would not be presumed, citing Escobedo v. Illinois, 378 U.S. 478, 490, n. 14 (1964); Carnley v. Cochran, 369 U.S. 506, 516 (1962); Glasser v. United States, 315 U.S. 60 (1942); and Johnson v. Zerbst, 304 U.S. 458 (1938). 16 L.ed.2d at 724. And for explanation of the underlying principle of the privilege the Court cited, among other sources, its recent opinion in Tehan v. Shott, 382 U.S. 406 (1966), which said that "the basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction, but rather to preserving

the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder the entire load.'"

Here the prosecution shouldered no load at all. The appellants had furnished proof of their guilt in confessions. This Court, en banc, had ruled that proof inadmissible (Harrison v. United States, ___ U.S. App. D.C. ___, 359 F.2d 214 (1965)), but that was of no moment. At the previous trial the introduction of the inadmissible confessions had forced the appellants to the witness stand to explain away the confessions. With these confessions wrongfully admitted in evidence conviction was virtually certain unless the appellants took the stand to deny them. In the words of the Bram case, each appellant was "involuntarily impelled to make a statement, when but for the improper influences he would have remained silent." These statements admitted all the elements of the alleged felony murder except intention to rob the deceased, and that the government was willing to infer.[1/] What need was

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1/ See Point III of this brief. In addition to the errors there noted, the attention of the Court is invited to Tr. 107 et seq., where the prosecutor read portions of the prior trial transcript that involved statements of the appellant Harrison made to the police prior to waiver of the Juvenile Court's jurisdiction over him contrary to this Court's exclusion of "all statements made at a time when he is [was] subject to the exclusive jurisdiction of the Juvenile Court." Harrison v. United States, ___ U.S. App. D.C. ___, 359 F.2d 214, 224 (1965).

there for the government in the present trial to shoulder any load as long as it had available in the transcript of the previous trial the fruits of its prior wrongful use of the appellants' confessions? And why be concerned with the means of obtaining that evidence: After all, weren't the appellants already twice-convicted and guilty?

To this view there can be but one answer. The prosecutor no less than the police must respect an alleged criminal's Constitutional privilege of silence. See, e.g., Griffin v. California, 380 U.S. 609 (1965) (comment on silence not allowed); Malloy v. Hogan, 378 U.S. 1, 8 (1964) (silence not contempt); Murphy v. Waterfront Comm'n of N.Y., 378 U.S. 52 (1964) (testimony compelled by state, and fruits thereof, inadmissible in federal prosecution). The fact that a defendant has been the loser twice in trials condemned as unfair by this Court does not make him guilty or deprive him of the presumption of innocence. That presumption exists until overcome by evidence. And that evidence must be fairly and lawfully obtained without violation of the rights of the accused. Otherwise the defendant must go free, whether innocent or guilty.

That must be the result here. The sole evidence of any significance here was obtained from the appellants' own mouths by the government's wrongdoing. A conviction so obtained

cannot be allowed to stand. As Mr. Justice Frankfurter wrote in a similar context in Walder v. United States, 347 U.S. 62, 64-65 (1954):

> "The Government cannot violate the Fourth Amendment--in the only way in which the Government can do anything, namely through its agents--and use the fruits of such unlawful conduct to secure a conviction. Weeks v. United States (US) supra. Nor can the Government make indirect use of such evidence for its case, Silverthorne Lumber Co. v. United States, 251 U.S. 385, 64 L ed 319, 40 S Ct 182, 24 ALR 1426, or support a conviction on evidence obtained through leads from the unlawfully obtained evidence, cf. Nardone v. United States, 308 U.S. 338, 84 L ed 307, 60 S Ct 266. All these methods are outlawed, and convictions obtained by means of them are invalidated, because they encourage the kind of society that is obnoxious to free men."

What could be more obnoxious to free men than the course of the government in this case? Six years after the alleged crime the appellants were convicted out of their own mouths with testimony wrung from them at two prior unfair trials by use of inadmissible confessions. Neither the Fifth Amendment nor the integrity of the judicial process permits such a result.

II. THE SIXTH AMENDMENT COMMAND OF A SPEEDY TRIAL WAS VIOLATED WHEN THE APPELLANTS WERE TWICE HELD FOR TWO YEARS AWAITING TRIAL.

The appellants have now been held in jail without a fair trial for more than six years--since March 28, 1960. This cannot be squared with the Sixth Amendment's provision that

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . . ."

As pointed out in the scholarly opinion of Judge Thomsen in the celebrated case of United States v. Provoo, 17 F.R.D. 183, 196 (D.C.D. Md. 1955), aff'd, 350 U.S. 857 (1955):

> "The right to a speedy trial is of long standing and has been jealously guarded over the centuries. Magna Carta states: 'To no one will we sell, to no one deny or delay, right or justice.' This provision was implemented by special writs of jail delivery and later by commissions of general jail delivery, under which special judges cleared the jail twice a year." (Citation omitted.)

While six months is no longer the maximum measure of the time allowed to bring a prisoner to trial, six years' delay is surely too much.

When this case was briefed to this Court on behalf of the appellants last, in September 1963, they contended that the delay up to that time had violated their Constitutional right to a speedy trial. That delay was brushed aside by this Court (see 359 F.2d at 222). However, the ensuing delay of more than two years consumed by this Court's consideration of the case was neither dealt with nor excused. But it cannot be ignored. If such delay were occasioned by the prosecutor, it doubtless would be held a violation of the Sixth Amendment. And the fact that this delay is attributable to a court rather than the prosecutor is of no particular moment. See King v. United States, 105 U.S. App. D.C. 193, 196, 265 F.2d 567, 570, cert. denied, 359 U.S. 998 (1959). As the dissent in that case points out:

> "The right to a speedy trial guaranteed by that amendment means a trial without 'delays manufactured by the ministers of justice.' Black, Constitutional Law § 266, quoted in United States v. Provoo, 17 F.R.D. 183, 197 (D.C.D. Md. 1955), affirmed 350 U.S. 857, 76 S.Ct. 101, 100 L.Ed. 761 (1955). The amendment was intended not only to prevent delays manufactured by the prosecutor, but to require 'the judicial tribunals to proceed with reasonable dispatch in the trial of criminal prosecutions.' Shepherd v. United States, 163 F.2d 974, 976 (8th Cir. 1947)." (105 U.S. App. D.C. at 199, 265 F.2d at 573).

The Court will no doubt realize that the foregoing is not meant to charge bad faith. That is not the point. For it does not matter that the governmental actions were in good faith. See United States v. Provoo, supra, at 201-02. The point here, rather, is that the delay in bringing the appellants to trial this third time did not stem from any such practical or pressing necessity as in other circumstances has been held to require some compromise of a defendant's right to a speedy trial. See, e.g., King v. United States, 105 U.S. App. D.C. 193, 265 F.2d 567, cert. denied, 359 U.S. 998 (1959). The delay in this case was unnecessary; it was not caused by the appellants; and it denied them the speedy trial that the Constitution guarantees them and all citizens.

III. THE TRIAL COURT SHOULD HAVE DIRECTED ACQUITTAL WHEN THE GOVERNMENT FAILED TO PROVE ATTEMPTED ROBBERY, AN ESSENTIAL ELEMENT OF THE OFFENSE CHARGED, AND SUBSTITUTED IMPROPER ARGUMENT FOR SUCH PROOF IN ARGUING TO THE JURY.

The indictment in this case charged that the appellants murdered George H. Brown "by means of shooting him with a shotgun while attempting to perpetrate the crime of robbery" and the prosecutor's opening statement claimed that the government would "show through competent testimony" that

the appellants went to the home of the deceased "armed with a sawed off shotgun" and "for the purpose or robbing him." (Tr. 5-6).

What the government actually proved was that Brown was killed. Apart from statements by the appellants, there was no evidence that they ever went near the home of the deceased or that Harrison even had a shotgun, let alone killed Brown with one. And even with the testimony of the appellants, there was no evidence of attempted robbery.

In these circumstances the case should never have been submitted to the jury. The lack of evidence of attempted robbery, an essential element of the crime charged, was a fatal defect in the government's case as a matter of law. There was no showing of a corpus delicti of felony murder by substantial independent evidence as required by such cases as Opper v. United States, 348 U.S. 84 (1954), and Smith v. United States, 348 U.S. 147 (1954). And the evidence taken as a whole fell far short of showing guilt beyond a reasonable doubt. The appellant Harrison's going to Brown's door with a shotgun and the appellant White's presence nearby--all in broad daylight--may have raised a suspicion, "but a suspicion, even a strong one, is not enough. Guilt must be established beyond a

reasonable doubt, and each and every element of the offense charged must be established beyond a reasonable doubt." Hiet v. United States, ___ U.S. App. D.C. ___, No. 19716, June 22, 1966, slip opinion, p. 3, emphasis supplied.[1/]

Here the only "proof" of a robbery attempt came from the mouth of the prosecutor. He argued that the testimony he had read from the previous trial showed an attempted robbery (Tr. 137 et seq.) and the Trial Court confirmed this for the jury by comment at the time (Tr. 175) and by instructing on accomplice testimony (Tr. 197-198), which meant "that the crime was committed and, in effect so advised the jury." Christy v. United States, 261 F.2d 357, 361 (9th Cir. 1959). And the deficiency of proof was further compensated for by a highly prejudicial "appeal wholly irrelevant to any facts or issues in the case," Viereck v. United States, 318 U.S. 236, 247 (1943), and McFarland v. United States, 80 U.S. App. D.C. 196, 197, 150 F.2d 593, 594 (1945), which the prosecutor made in closing argument with apparent approval by the Trial Court. (Tr. 177). Thus excessive zeal for conviction was substituted for proof, depriving the appellants of a fair trial and producing a result that cannot in good conscience be allowed to stand.

1/ See also Cooper v. United States, 94 U.S. App. D.C. 343, 218 F.2d 39 (1954); Cephus v. United States, 117 U.S. App. D.C. 15, 324 F.2d 893 (1963); Campbell v. United States, 115 U.S. App. D.C. 30, 316 F.2d 681 (1963).

CONCLUSION

It is time and past for this Court to deal firmly and finally with this case, which must be the oldest in the dockets, or nearly so, by reversing the convictions with directions to dismiss the indictments. There is no admissible evidence of significance that these appellants are guilty of any crime and there never has been. Yet they have spent more than six years in jail awaiting the ponderous processes of the law that to this day have failed to afford them a fair trial. As it now stands this case presents a singular example of oppression and denial of due process which is not rendered tolerable by the fact that it has been largely unintended. Accordingly the Court is urged to give this case the early, favorable and final consideration that it requires.

Respectfully submitted,

/s/ Alfred V. J. Prather

ALFRED V. J. PRATHER

/s/ George J. Thomas

GEORGE J. THOMAS

Attorneys for Appellants
By Appointment of this Court

August 23, 1966

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,280

EDDIE M. HARRISON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 20,281

ORSON G. WHITE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
ROBERT KENLY WEBSTER,
Assistant United States Attorneys.

Cr. No. 365-60

QUESTIONS PRESENTED

1. Was the evidence sufficient to support a conviction for felony murder committed during an attempted robbery where

a) appellants engaged in a conspiracy during which they were together before, during, and after the crime, were seen "shadowing" the victim minutes before the crime and were shown to have recently borrowed the getaway car, and regrouped in the car after the killing;

b) each appellant had a motive to rob: *i.e.*, a *need* for money, and at the time was looking for employment;

c) the victim was known by one appellant to be a "fence" and was found with approximately two thousand dollars on his person after the robbery was foiled; and

d) attempted robbery may be inferred from the circumstances of the shooting which also admit to no other conclusion?

2. Did the evidentiary use by the government in its case in chief of appellants' prior trial testimony, which was voluntarily made in open court in the presence of counsel, violate appellants' constitutional rights where appellants allege, unsupported by the record, that their prior trial testimony was given to explain their three year old confessions subsequently held illegal under *Mallory* and *Harling?*

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OTHER REFERENCES

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,280

EDDIE M. HARRISON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 20,281

ORSON G. WHITE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On May 4, 1966 appellants were convicted of felony murder (22 D.C. Code § 2401) by a jury for a shotgun slaying perpetuated in the course of an attempted robbery (Tr. 208). A co-defendant, Joseph R. Sampson was acquitted at the end of the government's case (Tr. 136). On the recommendation of the jury appellants were sentenced to life imprisonment (Tr. 208).

a. Case History

The indictment, filed April 19, 1960, charged appellants and Sampson with the felony murder and premeditated murder of George Brown (known as "Cider"), on March 8, 1960.[1] The first trial by jury, in September and October 1960, resulted in the conviction of all three for felony murder[2] and in the imposition of the death sentence, then mandatory.[3]

After sentencing on April 21, 1961 and while a notice of appeal was pending, it was discovered that the L. A. Harris who had represented appellants at trial and at argument of new trial motions and at sentencing was, in fact, an ex-convict and an unlicensed impostor whose real name was Daniel Oliver Wendel Holmes Morgan. Therefore, this Court on June 22 and July 3, 1961 vacated the three judgments of conviction and ordered the District Court to entertain motions for a new trial. Appellants and Sampson, claiming double jeopardy, refused to so move, causing this Court in June 1962 to reinstate the appeal and to order a second trial for all three.

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[1] Unless otherwise specified in Counterstatement (a), references may be found in the District Court docket entries or in the orders and division opinion of this court in *Harrison, White & Sampson* v. *United States*, —— U.S. App. D.C. ——, 359 F.2d 214, 214-18 (1965).

[2] The District Court dismissed the premeditated murder count upon the government's oral motion.

[3] 22 D.C. Code § 2404 (1925).

The three were tried anew for felony murder in April 1963, again convicted by jury, and this time, upon the jury's recommendation, sentenced to life imprisonment.[4] On appeal, argument was heard but prior to decision a rehearing *en banc* was ordered on June 1, 1965, by the Court *sua sponte* on the admissibility of appellant Harrison's oral statements. On December 7, 1965 all convictions were again reversed because of the use at trial of inadmissible confessions.

Appellants' third conviction for felony murder in May of 1966 is the subject of the instant appeal.

b. The Murder of "Cider" Brown

At trial the testimony of the coroner[5] showed that "Cider" Brown was killed by a blast from a 12 gauge shotgun firing No. 4 shot (Tr. 11, 12) which entered the head "from front to back, approximately horizontal and slightly from right to left," and which "destroyed" the right eyeball leaving a "gaping macerated wound . . . on the right side of the face" (Tr. 10, 11). Brown was six feet tall and weighed 267 pounds (Tr. 10).

Apart from the deceased and the two appellants, there were no eye witnesses to the crimes. Ethel I. McCoy, however, who lives "right across the street" from the site of the slaying (Tr. 33), was an ear witness, hearing the shotgun report from her front bedroom sometime between 9 and 9:30 on the morning of March 8, 1960 (Tr. 34). She raced downstairs and out into the street in time to

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[4] 22 D.C. Code § 2404 (1962) amended its predecessor to permit the jury to recommend life imprisonment.

[5] In the interim between the second and third trials some of the government witnesses had either died or could not be located. In the ensuing presentation of the facts, a portion of the source is found in the testimony in person of certain witnesses: that of Ernestine Brown, a relative who identified the body; of Captain Edward A. Daly, who inspected the murder scene; and of Benjamine Valentine, to whom Appellant Harrison confessed shooting the deceased. The remaining testimonies were read from the record of the second trial.

see two boys run from the doorway of Brown's house, run down the road and disappear around the corner on R Street (Tr. 34-6). As the second boy emerged from the doorway, he was carrying a "shotgun" which appeared to have been "sawed off," and he concealed the shotgun under his coat during his flight (Tr. 34-6).

Captain Edward A. Daly of the Metropolitan Police Department, responding to the scene shortly after 9 a.m., found "Cider" Brown inside his home propped face-first against the front door which was closed (Tr. 18). There were powder burns on his face which had been "blasted" by a gun (Tr. 19). Some "shot from a shotgun shell was embedded in the frame around the door window which had been shattered "from the outside", scattering glass inside the house (Tr. 21, 22). There was a "blast hole" through the door's window shade, which also had powder marks on it (Tr. 21, 22). Captain Daly testified that "around two thousand dollars" was recovered from Brown's pants pocket (Tr. 19, 20).

At about midnight on the evening before the murder. Harrison, who admitted not having a driver's permit (Tr. 115), borrowed a 1951 Buick sedan from one James Evans (Tr. 40, 41, 43). Evans had met Harrison, White and Sampson in a restaurant and had taken them all in his station wagon to pick up the Buick (Tr. 42, 43). Evans told Harrison to "be sure to have it to me in the morning at the shop" but actually did not see the car again for two days (Tr. 44).

The trail of the three is next picked up at 8:45 or 8:50 on the morning of the crime when Thomas Young, sitting in a booth with Brown at the Keys restaurant, observed Sampson in the restaurant "looking at us" (Tr. 46, 48). Ten minutes later when Young and Brown left, Sampson left right behind them, walked to a black Buick parked nearby, "stood there at the car for a moment or so, and then he got in the car" with "two more" (Tr. 46, 48-50). Brown drove off alone and was slain a few moments later (Tr. 46, 47). Asked whether

he knew if Brown had money on him that day, Young replied, "yes" (Tr. 47).

White's testimony from the previous trial showed that he and Harrison had indeed gotten together at 7:30 or 8 a.m. on the morning of the crime, ostensibly "to go look for a job" in the Buick borrowed the night before (Tr. 61, 81). They picked up Sampson a short time later (Tr. 62). Denying that he had been in the vicinity of Keys restaurant earlier that morning, White admitted that Sampson drove the car to "Cider" Brown's house where Harrison got out (Tr. 66-7, 78-9). After smoking two marijuana cigarettes, White went to look for Harrison. He found Harrison on Brown's porch, joined him in the three-foot vestibule, and told Harrison "come on, so we could go look for the job" (Tr. 68-72). As he returned to the sidewalk he heard an "explosion" (Tr. 74, 75) and started running down to R Street with Harrison close behind him. Nearby he got back into the car with Sampson, who was still driving, and Harrison (Tr. 76). White had his recollection refreshed with testimony from the first trial in which he admitted having seen Harrison throw a shotgun into the back of the Buick on the morning of the killing but equivocated at the second trial, claiming he could not remember whether he previously testified to this or not (Tr. 86). He claimed not to have seen Harrison take the shotgun up to Brown's house (Tr. 82-3). Insisting that he was not in the vestibule when the shotgun was fired, he was impeached with his testimony from the first trial in which he said "As soon as I got in the vestibule, I saw this door close up against the gun and a big explosion went off; and I turned around and started to run" (Tr. 89-90). White admitted that he was only working part time at the time of the crime and hadn't worked the day before (Tr. 93).

Harrison's testimony from the second trial was also read into evidence. He admitted getting his shotgun from his house, putting it in the car, having Sampson drive him together with White to Brown's house "close to 9:00 o'clock" (Tr. 103-04). He then gave his version of the

"accidental" shooting which depicted him bringing the shotgun [6] to Brown as a pawn, having pawned items, including the shotgun to Brown before (Tr. 107); knocking at the door (Tr. 104); seeing Brown push the shade aside, look out, open the door and ask if Harrison had anything for him (Tr. 104); hearing Brown say, "Let me see it, come on in" (Tr. 104); and raising up the gun which he was carrying at his side as he entered in order to let Brown see it at which time Brown "pushed the door in my face and the glass of the door hit the gun and the gun went off" (Tr. 104-05, 116-17); and finally running out of the door, almost colliding with White on the steps, after being knocked backwards by the blast (Tr. 105-06). He admitted being picked up later by Sampson in the car. (Tr. 126).

Benjamine Valentine's testimony revealed that in March 1960 he had a conversation with Harrison in which Harrison admitted going to Brown's house with a shotgun under his coat and killing Brown (Tr. 53, 54). Harrison further told Valentine that "evidently Cider George saw the shotgun, and he went inside of his coat as if he was going for a gun" (Tr. 54). At this point the conversation with Valentine was interrupted and was not renewed (Tr. 54, 55).

Appellants presented no evidence or testimony in defense (Tr. 136).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Amendment V of the Constitution of the United States, provides in pertinent part:

> "No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . ."

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[6] Harrison claimed he did not know the shotgun was loaded (Tr. 113).

Amendment VI of the Constitution of the United States, provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."

Title 22, District of Columbia Code, § 2401 (1961), provides in pertinent part:

> "Whoever, being of sound memory and discretion, kills another purposely . . . in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any . . . robbery . . . is guilty of murder in the first degree."

SUMMARY OF ARGUMENT

I

The record contains sufficient evidence of attempted robbery to support the instant felony murder convictions. Appellants, acting in a conspiracy, were seen together the night before the killing at a restaurant; shortly thereafter they borrowed a car for the remainder of the night; they got together an hour before the crime; by reasonable inferences from the facts they were "shadowing" the victim minutes before his death; they went together to the scene of the murder; and they fled together, and regrouped in the borrowed car after the killing. Each appellant's independent need for money demonstrates a robbery motive; furthermore, both men were then looking for employment. That the deceased was known to be a "fence" and actually carried about two thousand dollars on his person at the time of his death strengthens the robbery motive. The circumstances of the killing—two men, only one of whom is armed going to the home of the deceased —with a loaded weapon capable of concealment—imply robbery as the motive. Intent, which must be inferred from the circumstances, was properly adduced from the facts by the jury.

II

Appellants' argument that they were compelled to take the stand and testify is without merit and is discredited by settled authority in this jurisdiction. The contention that the prior testimony is fruit of the poisonous confessions, which were excluded because of *Mallory* and *Harling*, assumes the premise that appellants took the stand in order to explain the confessions. This premise is speculation not supported by the record, and the argument therefore fails. Even assuming the premise, the argument should be rejected for three reasons. First, the same basic principles of justice which originally admitted the testimony (which was freely given under oath in the presence of counsel) when it favored appellants, demand that it also be admissible now. Second, the testimony was not poisoned fruit because the three years which intervened between the confession and the testimony at trial effected a conscious break from the poisonous tree; and third, appellants cannot be heard to complain where they reaffirmed, after arraignment and in the presence of counsel, the portions of their confessions which they found to their benefit.

ARGUMENT

I. There was ample evidence of attempted robbery to sustain a conviction of felony murder.

(Tr. 10, 11, 18, 21, 22, 36, 42-44, 47-50, 61-62, 65-69, 71-73, 78, 92-93, 96, 104-07, 112, 116-17, 126)

Contrary to appellants' contention, there is ample evidence to support the government's theory that Harrison and White, in the furtherance of a conspiracy, attempted to rob "Cider" Brown and, when Brown's death resulted, became guilty of felony murder.

The record reveals compelling evidence of a conspiracy: (a) Harrison, White and Sampson were together at the restaurant close to midnight the night before the killing

(Tr. 42); (b) from the restaurant the three went together with Evans to borrow a Buick sedan which was to be returned in the morning (Tr. 43, 44); (c) the three got together in the borrowed Buick shortly after eight o'clock on the morning of the crime (Tr. 61, 62); (d) minutes before the killing Sampson was observed watching Brown in a public restaurant, following Brown out of the restaurant and getting into a "black Buick" with "two more" at the time Brown was driving away alone (Tr. 48-50); (e) all three went in the Buick to Brown's house where only Sampson remained in the car (Tr. 66, 69); and (f) after the shooting and a brief flight on foot, Harrison and White regrouped with Sampson in the Buick (Tr. 76, 126).

The jury could reasonably find that robbery was the objective of the conspiracy through proof of the robbery motives of Harrison and White, through proof of the fact that Brown possessed money, which in itself suggests a motive, and through the circumstances of the shooting itself.

The evidence showed that both Harrison and White had a *need* for money which excited their motive to rob Brown.[7] Harrison so admitted when he stated that his purpose in seeing Brown was to get money on a pledge (Tr. 107). White had a need for money to keep him in his narcotic habit, evinced by his use of marijuana cigarettes (Tr. 68, 73). Furthermore, Harrison and White had gotten together on the day of the crime, which was a weekday, to look for a job (Tr. 61, 71-2, 92-3).

Possession of money or property by another has traditionally been competent evidence to show motive to rob. See 2 WIGMORE, EVIDENCE § 392, p. 340 (3rd. ed. 1940). Harrison knew that Brown was a "fence" because he had had prior dealings with him in that capacity over the past year or two (Tr. 107). Naturally, when one goes to

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[7] See *People* v. *Bigelow*, 165 Cal. App. 2d 407, 332 P. 2d 162, 169 (1958); *People* v. *Gorgol*, 122 Cal. App. 2d 281, 265 P. 2d 69, 83 (1953).

pledge or sell an object under these circumstances one expects immediate money. Brown was prepared to give immediate money, for, as Captain Daly testified, he died with some two thousand dollars in his pocket (Tr. 19, 20). Brown evidently did not keep his financial condition a secret, for Young was aware of it (Tr. 47). As one court has observed, possession of money itself "suggests a motive for committing a robbery". *Kennedy* v. *People*, 39 N.Y. 245, 253-54 (1868).

The facts surrounding the crime provide sufficient circumstantial evidence of the intent to rob. Harrison, who did not have a driver's permit, borrowed a car at midnight for use until the following morning; he carried a *loaded* gun which could be easily concealed under his coat (Mrs. McCoy testified that it looked "sawed off") (Tr. 36, 104); an unarmed accomplice was with him in the vestibule at Brown's house (Tr. 78); a car with a ready driver was waiting for a possible get away from the residential area (Tr. 65-7, 104); and after firing a shotgun blast through the front door window and its shade he did not stop to render possible aid but instead took immediate flight with his conspirator (Tr. 74, 105, 106).

The facts also compel the conclusion that the gun was intentionally pointed at Brown. The gunshot charge entered Brown's face "front to back, approximately horizontal and slightly from right to left" (Tr. 11), which indicates that the gun was raised and fired while parallel to the floor. This conclusion is inescapable when coupled with the evidence that Brown was six feet tall and that the gun was fired through the front door window and window shade (Tr. 10, 21, 22). Harrison, of course, admitted that he carried the gun in the palm of his hand, claiming he carried it with his arms at his side when approaching Brown's door (Tr. 116-17), and therefore he would have had to raise the gun to shoulder level to inflect the wound he did.[8]

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[8] Brown, it would appear, quickly perceived that Harrison was not the known, friendly customer Harrison at trial claimed to be (Tr. 107), but, instead, was bent on robbery. In his attempt to

Having rejected the possibility that the shooting was accidentally committed under innocent circumstances, the jury was left to determine the motive for the killing. There was no evidence of motive in the case other than evidence of intent to rob.[9] The absence of evidence of any other reason for the killing strengthens the conclusion that robbery was the purpose of appellants' visit to the home of "Cider" Brown.

The government proved that Harrison and White committed certain overt acts which clearly establish an attempt: they went to Brown's front door; Harrison carried a loaded shotgun; the gun fired when held by Harrison; and they fled. Their intent to rob must be inferred from the circumstances[10] and is a matter for the jury. *Morissette* v. *United States*, 342 U.S. 246, 274 (1952).

This Court has previously recognized that the circumstances alone, absent any eyewitnesses and any usable expression of intent, may warrant a finding of attempted robbery. See *Accardo* v. *United States*, 102 U.S. App. D.C. 4, 249 F.2d 519 (1957); *Medley* v. *United States*, 81 U.S. App. 85, 88, 155 F.2d 857, 860, *cert. denied*, 328 U.S. 873 (1946). This is all the more true in the instant case where in addition to the circumstances there is evidence of conspiracy, motive for the robbery, and a large amount of money on the victim. "[O]n all the evidence the criminal responsibility of appellant[s] as indicted

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avoid the holdup, Brown slammed the door, possibly locking it (Tr. 18, 78, 104-05). The door, which opened inward, was wedged closed with Brown's body up against it (Tr. 18, 112). Had Brown not been moving forward to hurriedly shut out the robbers, it would seem that the deadly shotgun blast at such close range would have knocked him backwards.

[9] The motive of assault was properly rejected by the jury (a) because there was no evidence supporting it; and (b) because the basic factual situation of two men going to the home of the victim at 9 a.m. in the morning with only one carrying a gun negates assault and strengthens robbery as a motive.

[10] See Manual on Uniform Jury Instructions in Federal Cases § 4.04, 33 F.R.D. 550-51 (1963).

was a fair question for the jury." *Young* v. *United States*, D.C. Cir. No. 20,023, decided September 29, 1966.

II. Appellants' testimony from the prior trial was properly introduced into evidence.

At trial the government introduced in its case in chief portions of the testimony of White and Harrison which was voluntarily given in the presence of and presumably on advice of counsel at their prior trial. Appellants now claim that their own swords should not be used against them, that their election as a matter of trial tactics to take the stand in the second trial should not be allowed to prejudice them in the subsequent trial. The effect of their contention is to urge that their testimony is probative for a jury's consideration when it is to their benefit, but should be excluded when it is used againt them.

Appellants, in a two-pronged challenge, first assert that the use of their prior judicial testimony violates their constitutional privilege not to be compelled to be witnesses against themselves. This Court buried that contention in *Milton* v. *United States*, 71 U.S. App. D.C. 394, 110 F.2d 556 (1940), which has since rightly stood unrebuked. Appellants' second contention, that their testimony was "fruit of the poisonous tree" [11] requires more extensive discussion.

It must be noted that nowhere on the record is there support for appellants' contention that the reason they took the stand was in order to combat their confessions. Thus there is completely lacking the essential showing which must necessarily be made before appellants can ever begin to advance their cause-and-effect argument.

In any event, the argument is deficient. Appellants' confessions, used in the government's case in chief at the second trial, were ruled illegal under *Mallory* [12] and *Har-*

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[11] See *Nardone* v. *United States*, 308 U.S. 338, 341 (1939).

[12] 354 U.S. 449 (1957).

ling,[13] respectively. —— U.S. App. D.C. ——, 359 F.2d at 220, 223. Thus the confessions suffer from an infirmity which is not constitutional in basis but rather violates an evidentiary rule promulgated by the courts in their supervisory capacity.[14] As the Supreme Court has said, "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." *Wong Sun* v. *United States*, 371 U.S. 471, 487-88 (1963).[15] Federal courts have followed this dictum in a variety of circumstances.[16]

Appellants contention that a judicial admission, voluntarily given in open court with counsel present should not be admitted into evidence basically offends the concept that a trial is a search for truth and should be rejected for that reason.

Furthermore, the poisonous tree theory is not applicable to the instant case because of the three year time lag between the statment and the testimony at trial. See *United States* v. *Bayer*, 331 U.S. 532 (1947). This Court hinted such in the *Killough* decision when it was emphasized that the second oral confession came "so soon after" the first illegal confession. *Killough* v. *United States*, 114 U.S. App. D.C. 305 at 308 and 312, 315 F.2d 241 at 244 and 248 (1962). The Second Circuit so con-

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[13] 111 U.S. App. D.C. 174, 295 F.2d 161 (*en banc*, 1961).

[14] See *McNabb* v. *United States*, 318 U.S. 322, 341 (1943).

[15] At common law, of course, the admission of evidence was not affected by the manner in which it was obtained. *Olmstead* v. *United States*, 277 U.S. 438, 467 (1928).

[16] *Walder* v. *United States*, 347 U.S. 62 (1954) (illegally obtained evidence competent to attack defendant's credibility); *Tate* v. *United States*, 109 U.S. App. D.C. 13, 17, 283 F.2d 377, 381 (1960) (same; "Mallory confessions, though excluded for other reasons, are trustworthy and give a true picture of the facts"); *United States* v. *Kniess*, 264 F.2d 353 (7th Cir. 1959) (refusal to invalidate guilty plea because of fact that confession was obtained during illegal detention); *Armpriester* v. *United States*, 256 F.2d 294, 297 (4th Cir.), *cert. denied*, 358 U.S. 856 (1958) (illegal statement used at sentencing).

cluded where two months passed between the two confessions. See *United States* v. *Drummond*, 354 F.2d 132 (2d Cir. *en banc* 1965). In short, there has been a conscious break in the poisionous tree.

But there is another reason why the prior testimony of White and Harrison was properly used by the government at retrial. Illegal written or oral statements may be used if they are reaffirmed by a defendant after arraignment[17] and after consultation with an attorney.[18] Clearly this was the instant case. Appellants' testimony amounted to a reaffirmation of the portions of their confessions which assisted their defense, and omitted those portions which were inculpatory.

This Court has sanctioned testimony of a witness whose identity was procured during an illegal detention. *Smith & Bowden* v. *United States*, 117 U.S. App. D.C. 1, 324 F.2d 879 (1963).[19] It follows that appellants' testimony, voluntarily given in a judicial proceeding should be, and was, properly admitted. The prophylactic purposes underlying the exclusion of the confessions will not be furthered by the exclusion of appellants' testimony at trial.[20]

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[17] *Goldsmith* v. *United States*, 107 U.S. App. D.C. 305, 277 F.2d 335 (1960); *Jackson* v. *United States*, 109 U.S. App. D.C. 233, 285 F.2d 675 (1960), *cert. denied*, 366 U.S. 941 (1961).

[18] *Killough* v. *United States*, *supra*. See also *Cantrell* v. *United States*, 116 U.S. App. D.C. 311, 323 F.2d 613 (1963) (illegal statement repeated on the stand at trial); *Ercoli* v. *United States*, 76 U.S. App. D.C. 360, 131 F.2d 354 (1942) (defendant objected to introduction of confession, then admitted same facts in his own testimony constituted judicial admission and operated as express waiver); 1 Wigmore, *op. cit.* at 344 (waiver of objection by introduction of similar evidence). Cf. *Johnson* v. *United States*, D.C. Cir. No. 19,969, decided September 15, 1966 (exploration of subject of confession by appellant waives claim of illegality).

[19] *Cf. Smith & Anderson* v. *United States*, 120 U.S. App. D.C. 160, 344 F.2d 545 (1965).

[20] Appellants contend that their Sixth Amendment rights have been infringed, particularly because of this Court's alleged delay in handing down the division and *en banc* decisions in the prior appeal (Br. pp. 16, 17). A speedy trial argument, however, was made on

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
ROBERT KENLY WEBSTER,
Assistant United States Attorneys.

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the last appeal and resolved against appellants in the opinion of the Division (unanimous on this point), which speaks as of the day of its release, December 7, 1965. —— U.S. App. D.C. ——, 359 F.2d 214, 217. It cannot be presumed that this Court remanded for retrial a case with an inherent constitutional infirmity.

Assuming *arguendo*, that appellants now proffer an unresolved Fifth or Sixth Amendment argument, such an argument is without merit. However zealously appellants' relevant constitutional rights have been guarded over the centuries, they have never been held to encompass a situation where one is the instrument of his own delay. *Cf. United States* v. *Ewell*, 383 U.S. 116, 120-21 (1965). Appellants elected to appeal a complex case involving serious issues, one of which necessitated rehearing before the entire court. The right to speedy trial is "consistant with delays" and "does not preclude the rights of public justice". *Beavers* v. *Haubert*, 198 U.S. 77, 87 (1905); see also *Pollard* v. *United States*, 352 U.S. 354, 361 (1957). Appellants' argument has been rejected by this Court in the context of alleged court delay at the trial level. *King* v. *United States*, 105 U.S. App. D.C. 193, 265 F.2d 567, *cert. denied*, 359 U.S. 998 (*en banc* 1959).

Furthermore the record is barren of any prejudice to appellants, and none is alleged. See *Hedgepeth* v. *United States*, D.C. Cir. No. 19,726, decided July 27, 1966; *United States* v. *Ewell*, *supra* at 122. Nor is mere incarceration, which may be considered a "hardship", sufficient to constitute prejudice requiring reversal of a conviction. *King* v. *United States*, *supra* at 196, 265 F.2d at 570.

Thus this Court properly concluded that "[n]o prejudice in fact was shown" and no other "constitutional rights" violated. —— U.S. App. D.C. at ——, 359 F.2d at 217.

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REPLY BRIEF FOR APPELLANTS

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

EDDIE M. HARRISON, ORSON G. WHITE, Appellants,	)	
v.	)	Nos. 20,280 and 20,281
UNITED STATES OF AMERICA, Appellee.	)	

APPEAL FROM JUDGMENT OF THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

ALFRED V. J. PRATHER
1707 L Street, N. W.
Washington, D. C. 20036

GEORGE J. THOMAS
412 Fifth Street, N. W.
Washington, D. C. 20001

Attorneys for Appellants
By Appointment of this Court

October 14, 1966

REPLY BRIEF FOR APPELLANTS

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

EDDIE M. HARRISON, ORSON G. WHITE, Appellants,	)	
v.	)	Nos. 20,280 and 20,281
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FOR THE DISTRICT OF COLUMBIA

The bulk of the government's brief is devoted to recitation of facts and argument designed to establish the guilt of the appellants. While that portion of the government's brief contains a number of debatable points and at least a few mistakes, there is no need to reply beyond inviting the Court's attention to the point, elaborated in the appellants' original brief, that such guilt cannot be established beyond a reasonable doubt on this record and cannot

even be established as a strong suspicion without reliance on the appellants' testimony from the former trial.

No need exists for further reply on this score because the guilt or innocence of the appellants has nothing to do with the principal point of their appeal, which is that they have been deprived of Constitutional rights and subjected to fatally prejudicial wrongdoing by the government. To this contention the government has provided no satisfactory answer. Neither its arguments nor the authorities it has cited begin to support its position that the appellants' rights have not been violated. What follows will be devoted to that subject, discussed under two headings, one devoted to the wrongful use of the appellants' testimony from their previous trial and the other to the violation of their right to a speedy trial.

I. THE GOVERNMENT HAS FAILED TO JUSTIFY ITS USE OF TESTIMONY EXTRACTED FROM THE APPELLANTS BY USE OF ILLEGALLY OBTAINED EVIDENCE.

The government has dismissed the appellants' principal contention in this case--that they were compelled to be witnesses against themselves--in two short paragraphs asserting that (1) the record shows no compulsion and (2) the Constitutional claim made here has in any event been "buried" by

this Court in Milton v. United States, 71 App. D.C. 394, 110 F.2d 556 (1940). Neither assertion is correct.

When the appellants' attempts to exclude their confessions from evidence at the former trial were unsuccessful, they had no alternative but to go on the stand. Without those confessions the government had no case. With them it had a sure case for conviction unless the confessions could be refuted. Such refutation could come only from the appellants. How can it be said that the appellants in that situation were under no compulsion to testify? They faced the very choice that gave rise to the privilege against self-incrimination in both England and the American Colonies--the choice between speaking out, thus being made the instrument of their own destruction, or risking death as the penalty for their silence.

The government relies on the Milton case, supra, to dispose of the appellants' contention that the use of this compelled testimony at the subsequent trial violated their Fifth Amendment rights. That case does not even mention such a contention, let alone "bury" it as the government claims. Milton is a narrow evidence case in which the defendant attacked the use of his former testimony as being

immaterial, irrelevant, incompetent and secondary evidence. The Court's rejection of this argument and its application of the familiar rule regarding use of ordinary judicial admissions sheds no light on use of compelled testimony at a subsequent trial.

The government's further arguments are similarly unfounded. They seek to avoid responsibility for use of poisoned fruit by asserting a time lag between the taking of the inadmissible confessions and the testimony produced by their wrongful introduction into evidence at the former trial. But that time lag is of no moment. There was no significant time lag between the government's wrongful introduction of the confessions and the testimony in question. More importantly, there was no break in the causal chain--no act of volition by the appellants--to dissipate the taint: The testimony was the direct result of the government's wrongdoing. In any event, while the authorities cited by the government show that proximity in time may indicate causation, Killough v. United States, 114 U.S. App. D.C. 305, 315 F.2d 241 (1962), or distance in time may indicate its lack, United States v. Bayer, 331 U.S. 532 (1947), United States v. Drummond, 354 F.2d 132 (2d Cir. 1965), nowhere do these decisions suggest that the time differential is a determinative factor.

The government also contends that incriminating statements which reaffirm previous illegally obtained admissions are admissible, when such statements are made after arraignment and after consultation with an attorney. The cases which the government cites for this proposition--which include Killough v. United States, supra; Jackson v. United States, 109 U.S. App. D.C. 233, 285 F.2d 675 (1960), cert. denied, 366 U.S. 941 (1961); and Goldsmith v. United States, 107 U.S. App. D.C. 305, 277 F.2d 335 (1960)--simply do not support it. In Killough, which presented a fact situation virtually indistinguishable from Jackson and Goldsmith, the post-arraignment statement was suppressed. The Killough opinion did attempt to distinguish the earlier cases on the ground that counsel had therein been consulted, but with perfectly apparent recognition that the distinction was most tenuous. The appellants believe that any reasonable view of Killough indicates that there is very little continuing strength in Jackson and Goldsmith.[1/]

1/ Judge Fahy, author of the Killough opinion, had dissented in Goldsmith and Jackson. In Goldsmith, he noted, "I am unable to ascribe to the fleeting representation which occurred any significance on the question of the admissibility of the confession," 107 U.S. App. D.C. at 316, 277 F.2d at 346, and in Jackson he made his view that the presence of counsel was of no significance equally clear. In his Killough opinion

(continued)

Moreover, even assuming the validity of the Killough distinction, these decisions do not hold that the presence of counsel ipso facto breaks the causal chain between an illegal confession and subsequent incriminating statements. At the most, they stand for the proposition that when a defendant who has been fully advised by the Court and by his lawyer of his right to keep silent nevertheless voluntarily confesses in order to help the police, his informed act of volition breaks any causal chain between prior illegal police conduct and his subsequent statement, rendering the latter admissible. This proposition rests on the at-least-arguable assumption that the attorney's advice will remove any ignorance or misconceptions on the part of the defendant concerning his obligations to talk to the police, which might be influencing him

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(Footnote continued)
itself, Judge Fahy noted that, were it impossible to distinguish Goldsmith and Jackson, "a majority of the court, which now for the first time considers the problem en banc, would be ready to reconsider those cases." 114 U.S. App. D.C. at 308, 315 F.2d at 244. Judge Wright's concurring opinion made his view as to the post-Killough viability of Goldsmith and Jackson perfectly clear: "As I have attempted to show, Mallory requires us to put an end to the reaffirmation doctrine espoused in Goldsmith and the second Jackson case." Id. at 315, 315 F.2d at 251. Finally, Judge Burger, in a dissenting opinion concurred in by Judges Miller and Bastian, observed: "Our holdings in the Goldsmith and Jackson cases did not rest on so fragile a distinction as the duality of warning and advice from both magistrate and counsel but on the more important factor of judicial warning." Id. at 322-23, 315 F.2d at 258-59.

to confess. This assumption simply cannot be indulged on the facts of the present case. Here all the attorney-client conversation in the world could not have removed the force compelling these appellants to testify. This force was not the appellants' ignorance of their legal rights; it was instead their fear of being executed or imprisoned for life, a fear directly traceable to the government's illegal use of their confessions.

The government's refusal to face up to the real problem of this case is further illustrated by its reliance on Cantrell v. United States, 116 U.S. App. D.C. 311, 323 F.2d 613 (1963), and Ercoli v. United States, 76 App. D.C. 360, 131 F.2d 354 (1942), which involved voluntary reaffirmation on the stand. In Cantrell the defendant made no objection to admission of the statements used by the government and in Ercoli the original statements were exculpatory and confirmed by the defendant. Neither case involved use of compelled testimony, consisting of denials of the truth of the statements used by the government, the operative facts here. If these cases which the government cites were in point--that is, if the appellants here had voluntarily reaffirmed their confessions upon the witness stand--the argument could have been made at

the time of the last appeal. Obviously, under the facts of this case the argument would have failed then as it must fail now.

Finally, the government cites a number of cases holding that not all fruit of poisonous trees must be suppressed. What it fails to do, however, is to cite a case in point, a case where the government used, during a trial, as part of its case in chief, evidence obtained as a direct result of a violation of the defendant's rights. The cases which the Government cites--having to do with impeachment, sentencing hearings, testimony of independent witnesses and knowing and voluntary guilty pleas--are governed by considerations not involved here.

The facts of this case are simple, if somewhat astounding. At a prior trial, the government's case rested upon the appellants' illegal confessions which the appellants sought to rebut by taking the stand. The only conceivable reason for their testifying was to counteract this illegal evidence. At a new trial the government attempted a sweeping end run around this Court's suppression of the illegal confessions by reading the appellants' former testimony to the jury. The government now blandly contends that "the prophylactic purposes underlying the exclusion of the confessions

will not be furthered by the exclusion of appellants' testimony at trial." That is not so.

If the government is permitted to get away with what it has done here it will have produced an obvious incentive to acquire evidence illegally and to introduce it. No policy justification whatsoever exists for this kind of encouragement to government lawlessness. Moreover, a decision sustaining the government's position will cause defendants to hesitate to take the stand in any case in which they allege that evidence has been illegally introduced against them. Such hesitation cannot in fairness be equated with the dilemma inherent in ordinary "trial tactics."

II. THE GOVERNMENT HAS FAILED TO JUSTIFY THE SIX YEARS' DELAY IN THIS CASE.

The basic argument that the appellants have been denied their right to receive a speedy trial was made in their brief and will not be repeated at this time. Suffice it to say that more than six years had elapsed between appellants' indictment and their recent trial, that most of this delay was caused in no way by the activities of the appellants, and that during all this period of time the appellants have been incarcerated, languishing in the fear of

being executed or imprisoned for life, depending on the outcome of their time-consuming trials and appeals.

The government in citing its authorities would have the Court totally ignore the distinctive facts about the present case that have just been summarized. The authorities themselves indicate, however, that the Court does not consider these facts to be irrelevant.

The first glaring fact about the present case is the length of time involved. The cases cited by the government simply do not involve comparable time delays. United States v. Ewell, 383 U.S. 116 (1965), involved a 19-month delay; Pollard v. United States, 352 U.S. 354 (1957), involved a two-year delay; Beavers v. Haubert, 198 U.S. 77 (1905), involved a delay of about a year; Hedgepeth v. United States, D.C. Cir. No. 19,726, decided July 27, 1966, involved a dealy of 14 months; and King v. United States, 105 U.S. App. D.C. 193, 265 F.2d 567, cert. denied, 359 U.S. 998 (1950), involved a delay of seven months. This case it must be borne clearly in mind involved a delay of more than six years, which dwarfs the delays involved in these other cases.

Second, the government would have the Court brush aside the appellants' argument on the specious ground that the appellants have been the cause of the delay here. The government's brief states:

> "Appellants elected to appeal a complex case involving serious issues, one of which necessitated rehearing before the entire court. The right to speedy trial is 'consistent with delays' and 'does not preclude the rights of public justice.'" (Citing Beavers v. Haubert, supra.)

It is true that the defendants chose to appeal their second conviction, though not their first; it may be true that their case was somewhat more complex than the typical one. But it is also true that the appellants were exercising their right to appeal and that they were entirely correct in their allegations that the government had improperly taken and improperly used their confessions. Of course an appeal takes some time; but does the "election" to appeal under these circumstances mean that there are no limits to the judicial delays that can thereafter occur? The appellants suggest that this question obviously must be answered in the negative.

This Court in Hedgepeth v. United States, No. 19726, decided July 27, 1966, in speaking of certain delays caused by the appellant in that case said:

> ". . . the fact that this delay is attributable to appellant does not mean that it is to be disregarded in considering whether a speedy trial was denied if there is an additional delay for which appellant is not responsible." (Slip op., p. 5).

The court delays involved in this case were clearly delays for which appellants were not responsible. The Court in King v. United States, 105 U.S. App. D.C. 193, 265 F.2d 567, cert. denied, 359 U.S. 998 (1959), considered a challenge by an appellant to delays incurred in the District Court. Although the Court found that under the circumstances of that case--including the fact that the delay involved was less than seven months--there was no unreasonable delay, its decision implied that court delays can, under certain circumstances, violate an accused's Constitutional rights. Such is the present case. There is no legally valid justification for the almost two-year appellate ordeal through which these appellants were previously made to live. The language of the four dissenting Judges in King seems exactly appropriate here:

> "While I agree that the constitutional right to speedy trial is consistent with necessary delays inherent in the processes of justice, I cannot agree that it permits processes that make for unnecessary or avoidable delay." 105 U.S. App. D.C. n.6 at 198, 265 F.2d n.6 at 572.

Appellants, while arguing sincerely that they have been denied their rights to speedy trial because of court delays, wish to repeat their statement that this allegation carries with it absolutely no implication of bad faith. Obviously, the principal reason for delays is that we simply do not have enough Judges to handle burgeoning caseloads. However, the failure of Congress to authorize new judgeships and the failure of the President to fill them and the vacancies which occur from time to time, cannot justify denial of the rights of accused persons. In a different context, this Court recently held:

> "We are aware that shortage of psychiatric personnel is a most serious problem today in the care of the mentally ill . . . . We also recognize that shortage cannot be remedied immediately. But indefinite delay cannot be approved. 'The rights here asserted are . . . present rights . . . and, unless there is an overwhelming compelling reason, they are to be promptly fulfilled.'" (Citing Watson v. Memphis, 373 U.S. 526, 533 (1963)). Rouse v. Cameron, No. 19863, decided October 10, 1966, pp. 12-13. (Emphasis supplied.)

Substituting the word "judicial" for the word "psychiatric" and the phrase "disposition of criminal cases" for the phrase "care of the mentally ill," one has a statement that applies compellingly to the appellants.

Finally, the government contends that no prejudice has been shown in the present case. What can it possibly mean? Even leaving to one side the obvious fact on this record that certain government witnesses had disappeared, and therefore the less satisfactory procedure of reading their prior testimony--without a chance for additional cross-examination--had to be followed, and the additional consideration that the appellants' memories can be presumed to have dimmed somewhat,[1/] correspondingly impairing their ability to help in their own defense, the prejudice here is obvious. Hedgepeth v. United States, supra, a case cited by the government, established that "the Sixth Amendment right affords essentially a 'dual protection: against prejudice to a defendant's defense and against prejudice to his person.'" (Slip op., p. 6). Prejudice to the person includes "undue and oppressive incarceration prior to trial" and "anxiety and concern accompanying public accusation." United States v. Ewell, 383 U.S. 116, 120 (1966). Although such prejudice was not present in Hedgepeth,

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1/ In King v. United States, supra, 105 U.S. App. D.C. at 199, 265 F.2d at 573 (dissenting opinion), a case which involved a delay of less than seven months, four members of this Court were willing to accept this kind of presumption. "I agree with the conclusion in Provoo, supra, that 'prejudice is presumed, or necessarily follows, from long delay' and that this is true a fortiori when the defendant is imprisoned during the delay."

since during the period of alleged delay appellant was incarcerated following conviction for another offense, it is clearly present here. The only thing that has been keeping these appellants in jail for the last several years has been the failure of the government and the courts to provide them with fair and speedy trials. Moreover, the anxiety issue--which the Court in Hedgepeth found to be "inconsequential" in light of the fact that the appellant there was already committed as a narcotics offender--cannot be dismissed so lightly here. It may be impossible for free men fully to comprehend the agony prisoners experience as their cases are slowly digested by the courts, particularly when they are very young and their lives are literally at stake. That is no reason to ignore it. And if the Sixth Amendment can be interpreted to encompass more than six years' delay within the concept of speedy trial, it guarantees an empty right indeed.

Respectfully submitted,

/s/ Alfred V. J. Prather

ALFRED V. J. PRATHER

/s/ George J. Thomas

GEORGE J. THOMAS

Attorneys for Appellants
By Appointment of this Court

CERTIFICATE OF SERVICE

I hereby certify that I have this 14th day of October 1966 served the foregoing Reply Brief For Appellants upon Frank Q. Nebeker, Esq., Assistant United States Attorney, by hand delivering a copy thereof to his office in the United States Courthouse.

/s/ Alfred V. J. Prather

ALFRED V. J. PRATHER

Attorney for Appellants
By Appointment of this Court